No. 22-285

In the Supreme Court of the United States

B-21 WINES, INC., ET AL., PETITIONERS

v.

HANK BAUER, CHAIR, NORTH CAROLINA ALCOHOLIC BEVERAGE CONTROL COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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The question presented by this case is whether a State may justify a discriminatory liquor law merely by asserting that it is an essential element of a three-tier system of distribution, or whether it must produce concrete evidence that the law promotes a legitimate interest and nondiscriminatory alternatives would be ineffective. Respondent does not dispute that there is currently a conflict between the decision below and a decision of the Seventh Circuit concerning that question. In the decision below, the Fourth Circuit held that it was sufficient for a State to assert that a discriminatory law was an essential element of a three-tier system of producers, distributors, and retailers. The Seventh Circuit, by contrast, rejected that

position and held that a State must produce concrete evidence that the restriction advances a legitimate interest.

Respondent tries to brush aside the conflict on the ground that the Seventh Circuit's decision predates this Court's decision in *Tennessee Wine & Spirits Retailers Association* v. *Thomas*, 139 S. Ct. 2449 (2019). Citing an intervening decision from this Court is a familiar move at the certiorari stage, but it doesn't work here for the simple reason that nothing in *Tennessee Wine* called into question the Seventh Circuit's reasoning. Quite the contrary. *Tennessee Wine* merely reaffirms the fundamental principle that, even in the wake of the Twenty-first Amendment, the Commerce Clause requires evidence to justify an alcohol-related law that discriminates against out-of-state businesses. *Tennessee Wine* can thus only help petitioners here. As Judge Wilkinson explained in his comprehensive dissent, simply labeling a feature as essential to a three-tier system does not excuse a State from the burden of producing concrete evidence that a "starkly" discriminatory law advances a legitimate interest and that nondiscriminatory alternatives would be inadequate. See Pet. App. 36a.

Respondent does not dispute that the question presented is an important one, and there is no valid reason to await further percolation. Five circuits have now weighed in, with the Second, Fourth, Sixth, and Eighth Circuits on one side of the conflict and the Seventh Circuit on the other. The dueling opinions below, and the opinions of other circuits, exhaustively lay out the arguments on both sides such that further percolation would serve no purpose. The fact that still more cases are in the pipeline merely highlights the practical importance of the question and the pressing need for this Court's guidance. The petition for a writ of certiorari should be granted.

A. The Decision Below Implicates A Conflict Among The Courts Of Appeals

Respondent argues that certiorari is premature because the Seventh Circuit's decision in *Lebamoff Enterprises, Inc.* v. *Rauner*, 909 F.3d 847 (2018), predates this Court's decision in *Tennessee Wine*. See Br. in Opp. 9-10. But nothing in *Tennessee Wine* undermined the holding of *Rauner*. As respondent admits, *Tennessee Wine* merely "confirmed" existing Twenty-first Amendment case law. See *id.* at 1. There is thus a square conflict between the Second, Fourth, Sixth, and Eighth Circuits, on the one hand, and the Seventh Circuit, on the other. See Pet. 6-12.

Respondent specifically contends that the Seventh Circuit "did not apply this Court's most recent pronouncement on the interplay between the dormant Commerce Clause and the Twenty-first Amendment." Br. in Opp. 9. But respondent does not identify anything from this Court's opinion in *Tennessee Wine* that cast doubt on the Seventh Circuit's reasoning in *Rauner*. To the contrary, the Seventh Circuit acknowledged that this Court had granted certiorari in *Tennessee Wine*, but noted that the issue in *Tennessee Wine* (residency requirements for licensure) differed from the issue presented here (direct shipment to consumers). See 909 F.3d at 849.

The Seventh Circuit did note that there were "other aspects of * * * Illinois law—not before [it] at present—that will be difficult for plaintiffs to surmount if *Tennessee Wine* does not come out in their favor." *Rauner*, 909 F.3d at 850. But of course, it *did* come out in the plaintiffs' favor, with this Court resolving a split concerning the scope of existing doctrine by "unequivocally endors[ing] the broader reading." Pet. App. 38a (Wilkinson, J., dissenting). There is thus no reason to believe that

Rauner would be decided any differently after *Tennessee Wine* than it was just before it.

Respondent tries to bolster its argument for further percolation by citing post-*Tennessee Wine* decisions of the Sixth and Eighth Circuits that upheld similar discriminatory statutes. See Br. in Opp. 8-9. But those courts did not suggest that *Tennessee Wine* worked a change in the law. See *Sarasota Wine Market, LLC* v. *Schmitt*, 987 F.3d 1171, 1175, 1177 (8th Cir.), cert. denied, 142 S. Ct. 335 (2021); *Lebamoff Enterprises Inc.* v. *Whitmer*, 956 F.3d 863, 869-870 (6th Cir. 2020), cert. denied, 141 S. Ct. 1049 (2021). Notably, even as the Eighth Circuit upheld Missouri's law, it acknowledged that "[t]here are passages in the *Tennessee Wine* opinion that may forecast a future decision" that such restrictions are unconstitutional. *Sarasota Wine Market*, 987 F.3d at 1183.

Accordingly, there is now an entrenched conflict among the courts of appeals. See Pet. 8-10. The Fourth Circuit upheld a law prohibiting out-of-state retailers from shipping wine directly to consumers on the ground that "the differential treatment with respect to wine shipping by retailers is an essential aspect of North Carolina's three-tier system." Pet. App. 27a-28a. The court explicitly stated that, "[w]hen, as here, an essential feature of a state's three-tier system is challenged, a court's role is more limited and does not entail an examination of the effectiveness of the three-tier system." *Id.* at 25a n.8. The Second, Sixth, and Eighth Circuits have reached the same result in cases involving materially indistinguishable statutes. See *Sarasota Wine Market*, 987 F.3d at 1175; *Whitmer*, 956 F.3d at 867; *Arnold's Wines, Inc.* v. *Boyle*, 571 F.3d 185, 186 (2d Cir. 2009).

By contrast, the Seventh Circuit has specifically rejected the position that the Constitution "protect[s] against discrimination only in the parts of the three-tier

system that are not 'inherent' or 'integral' to its existence." *Rauner*, 909 F.3d at 855. That court instead requires a State to prove that a discriminatory law, including any "exceptions" or "modif[ications]" to a three-tier system, is "*demonstrably* justified by a valid factor unrelated to economic protectionism." *Id.* at 853, 855 (emphasis added) (quoting *Healy* v. *Beer Institute*, 491 U.S. 324, 340-341 (1989)). Because there is no way to reconcile those conflicting decisions, this Court's review is warranted.

B. The Decision Below Conflicts With Decisions Of This Court

Respondent devotes a substantial part of his brief in opposition to defending the decision below on the merits. See Br. in Opp. 13-17. He no longer disputes that the law "targets out-of-state retailers for discriminatory treatment," in violation of ordinarily applicable Commerce Clause principles. Pet. App. 15a; see Br. in Opp. 14; Pet. App. 33a (Wilkinson, J., dissenting). Respondent instead argues that the law passes muster under the Twenty-first Amendment because it is an essential feature of a three-tier system. See Br. in Opp. 15-17. But the decision below cannot be reconciled with the nondiscrimination principle recognized in *Granholm* v. *Heald*, 544 U.S. 460 (2005), and reaffirmed in *Tennessee Wine*, *supra*. A State may not defend a discriminatory law simply by claiming it is an essential feature of a three-tier system without providing concrete evidence that the law promotes a legitimate interest. See Pet. 11-14.

Here, North Carolina's law is not essential to a three-tier system—both because the State has abandoned a true three-tier system for wine and because the discriminatory law has nothing to do with maintaining a three-tier system. And the meager evidence cited by respondent does

not even come close to meeting the exacting standard that this Court has adopted. The Fourth Circuit's "startl[ing]" decision should not be allowed to stand. See Pet. App. 37a (Wilkinson, J., dissenting).

1. The requirement that a State produce concrete evidence to justify a discriminatory liquor law is not petitioners' invention, as respondent suggests. See Br. in Opp. 15-16. The Court has explained that a discriminatory liquor law may be upheld only if the State demonstrates that it "advances a legitimate local purpose" that "cannot be adequately served by reasonable nondiscriminatory alternatives." *Granholm*, 544 U.S. at 489 (citation omitted). To do so, the State must point to "'concrete evidence' showing that the [law] actually promotes public health or safety" and "evidence that nondiscriminatory alternatives would be insufficient to further those interests." *Tennessee Wine*, 139 S. Ct. at 2474 (quoting *Granholm*, 544 U.S. at 490).

Under that test, the use of a three-tier system does not ensure the constitutionality of every aspect of a State's liquor laws. See Br. in Opp. 17. As the Court has observed, "the three-tier system *itself*" is "legitimate." *Granholm*, 544 U.S. at 489 (emphasis added). But *Granholm* "did not suggest that [the Twenty-first Amendment] sanctions every discriminatory feature that a State may incorporate into its three-tiered scheme." *Tennessee Wine*, 139 S. Ct. at 2471. Instead, the proper inquiry turns on whether a given law "treat[s] liquor produced out of state the same as its domestic equivalent." *Granholm*, 544 U.S. at 489. In other words, "each variation must be judged based on its own features." *Tennessee Wine*, 139 S. Ct. at 2472. To hold otherwise, as the Fourth Circuit did, would permit an end-run around the nondiscrimination principle of *Granholm*.

2. In addition, North Carolina's discrimination is not actually essential to its purported three-tier system. To begin with, North Carolina does not even truly maintain a three-tier system for wine with any "integrity," see Br. in Opp. 17, because in-state and out-of-state wineries alike can bypass the distribution and retail tiers and sell directly to consumers. The decision below repeatedly dismissed that provision of North Carolina law as a "limited exception." See, *e.g.*, Pet. App. 22a. But as Judge Wilkinson explained in dissent, "North Carolina specifically allows wineries to obtain a 'wine shipper permit' 'to sell and ship [up to] *two cases of wine per month* to any person in North Carolina to whom alcoholic beverages may be lawfully sold.'" *Id.* at 44a (alteration in original and emphasis added) (quoting N.C. Gen. Stat. § 18B-1001.1). For all practical purposes, therefore, North Carolina's wine regime is "not a regime premised on three separately owned tiers." *Id.* at 45a. And it is at best misleading for respondent to say that North Carolina "generally prohibits direct-to-consumer sales from outside the State." Br. in Opp. 1-2.

3. Even if North Carolina had a true three-tier system for wine, the discriminatory law at issue would bear no relation to maintaining it. As this Court is aware, three-tier systems were "adopted by States at least in large part to preclude" so-called "tied house[s]." *Tennessee Wine*, 139 S. Ct. at 2463 n.7. In a tied house, "an alcohol producer, usually a brewer, would set up saloonkeepers, providing them with premises and equipment, and the saloonkeepers, in exchange, agreed to sell only that producer's products and to meet set sales requirements." *Ibid.* As Judge Wilkinson observed, the "crux of the three-tiered system is to prevent vertical integration in alcohol distribution systems by strictly 'separating pro-

ducers, wholesalers, and retailers.'" Pet. App. 40a (quoting *Tennessee Wine*, 139 S. Ct. at 2471); see *Granholm*, 544 U.S. at 466. Accordingly, "[i]n no way is the three-tiered system jeopardized by a requirement of evenhandedness" between in-state and out-of-state retailers. Pet. App. 41a.

The experience of other States confirms that North Carolina's discriminatory law is not essential to a three-tier system. At least 11 States allow retail shipping from out of state while maintaining some form of three-tier system. See Pet. App. 41a. The fact that so many States do not impose the discriminatory requirement indicates that it is not an "essential feature" of a three-tier system. *Tennessee Wine*, 139 S. Ct. at 2471-2472.

4. In a last-ditch bid to save North Carolina's discriminatory law, respondent claims in passing that "the State compiled substantial record evidence showing that the out-of-state shipping ban materially advances public health and safety." Br. in Opp. 16. But the evidence to support the objectives respondent cites—regulating costs and reducing underage drinking—is woefully thin. See *id.* at 4-5. And as Judge Wilkinson noted, "each of North Carolina's undeniably legitimate Twenty-first Amendment interests could readily be furthered in a nondiscriminatory way." Pet. App. 30a.

First, there is no concrete evidence that out-of-state retailers would undercut North Carolina's efforts to decrease consumption by increasing the cost of wine, particularly given the cost of interstate shipping. As this Court has recognized, a State can easily regulate the cost of wine from out of state through taxation by "requiring a permit as a condition of direct shipping." *Granholm*, 544 U.S. at 491. Moreover, "improvements in technology have eased the burden of monitoring out-of-state [businesses]." *Id.* at 492; see *Tennessee Wine*, 139 S. Ct. at 2475.

Second, there is also no concrete evidence that North Carolina's law serves an interest in reducing underage drinking. Even if minors were not "less likely to consume wine, as opposed to beer, wine coolers, and hard liquor," they would still have "more direct means" of purchasing wine that would satisfy their desire for "instant gratification." *Granholm*, 544 U.S. at 490 (citation omitted). Further, as Judge Wilkinson noted, minors are "'just as likely to order wine from in-state [retailers] as from out-of-state ones,' or for that matter directly from wineries." Pet. App. 47a (alteration in original) (quoting *Granholm*, 544 U.S. at 490). In any event, there are "less restrictive steps to minimize the risk that minors will order wine," including requiring "an adult signature on delivery and a label so instructing on each package." *Granholm*, 544 U.S. at 490-491.

North Carolina is not forbidden from pursuing the objectives it has identified. As Judge Wilkinson observed, "[o]ne option is to impose 'an evenhanded licensing requirement,'" like other States do. Pet. App. 47a. North Carolina has simply failed to introduce evidence proving that such a licensing system would be ineffective. For all of the foregoing reasons, the decision below cannot be reconciled with the nondiscrimination principle of *Granholm*.

Judge Wilkinson correctly calculated that, "[a]dding *Granholm* and *Tennessee Wine* together, the writing is on the wall." Pet. App. 39a. In *Granholm*, this Court "explained that states may not implement discriminatory direct-shipment laws favoring in-state producers over out-of-state competitors." *Ibid.* Then, in *Tennessee Wine*, the Court "emphasized that this principle was not limited to producers, but applied to all out-of-state interests." *Ibid.* "The sum total is that North Carolina cannot implement

discriminatory direct-shipment laws favoring in-state retailers over out-of-state retailers." *Ibid.* This Court should grant review and reverse the decision below.

C. The Question Presented Warrants Review In This Case And Is Important

Respondent does not dispute that the question presented is an important one, instead pointing to the existence of multiple other pending cases as a reason to await further percolation. See Br. in Opp. 12. But that is a reason to grant review, not a reason to delay it. See Pet. 5-6. Respondent does not identify any facts or arguments in those cases that would present the Court with a superior vehicle to resolve the question presented. While respondent is correct that the Seventh Circuit may soon decide *Chicago Wine Co.* v. *Holcomb*, No. 21-2068, he offers no explanation—not even rank speculation—as to why the Seventh Circuit would suddenly reverse course from *Rauner*. See Br. in Opp. 10. Indeed, the defendants in *Chicago Wine* did not even argue that *Tennessee Wine* changed the law. As for the other pending cases, they will only deepen the existing conflict among five courts of appeals. See pp. 3-5, *supra*. And whatever might be said about the need for further percolation before the Fourth Circuit issued its decision, further decisions could add little to the thorough exchange of views between the majority and Judge Wilkinson.

The real significance of the other pending cases is as evidence of the practical importance of the question presented. The courts of appeals have now addressed the question presented three times in the last three and a half years. See Br. in Opp. 8. And they appear poised to address it as many as six more times in the near future. See *id.* at 12.

That is no fluke. Many consumers have turned to out-of-state retailers, often with online stores, to find rare wines that are not available from in-state retailers. See, *e.g.*, Indianapolis Greek-American Wine Consumers Br. 11-12. That trend has only accelerated in the wake of the COVID-19 pandemic, as consumers increasingly procure all kinds of goods online. See, *e.g.*, *Whitmer*, 956 F.3d at 877-878 (McKeague, J., concurring); 41 Wine Consumers Br. 13-14. By curtailing the ability of out-of-state retailers to sell directly to consumers, laws such as North Carolina's deprive residents of increased choice and out-of-state businesses of significant markets. Those real-world effects, on businesses and consumers nationwide, underscore the need for the Court's review.

* * * * *

The decision below squarely conflicts with the Seventh Circuit's decision in *Rauner*. It cannot be reconciled with this Court's decisions invalidating alcohol-related laws that discriminate against out-of-state products and actors. And there is no valid reason to delay review of an important and recurring constitutional question. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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